Supreme Court, U.S.
FILED
JUL 22 1999
OFFICE OF THE CLERK

No. 98-1875

IN THE

Supreme Court of the United States

M.A. EVERETT, *et al.*,

Petitioners,

v.

US AIRWAYS GROUP, INC., *et al.*,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

RESPONDENTS' BRIEF IN OPPOSITION

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QUESTION PRESENTED

Whether arbitration boards, or "system boards of adjustment" have exclusive jurisdiction to determine the meaning and application of collective bargaining agreements negotiated under the Railway Labor Act as this Court has previously held. *See, e.g., Hawaiian Airlines, Inc. v. Norris*, 512 U.S. 246 (1994); *Consolidated Rail Corp. v. RLEA*, 491 U.S. 299, 305 (1989); *Union Pac. R.R. v. Sheehan*, 439 U.S. 89, 94 (1978); *Andrews v. Louisville & Nashville R.R.*, 406 U.S. 320 (1972); *Gunther v. San Diego & Arizona Eastern Ry.*, 382 U.S. 257 (1965); *Brotherhood of Locomotive Eng'rs v. Louisville & Nashville R.R.*, 373 U.S. 33 (1963); *Pennsylvania R.R. v. Day*, 360 U.S. 548 (1959).

STATEMENT PURSUANT TO RULE 29.6

Pursuant to Supreme Court Rule 29.6, Respondents certify the following:

1. Respondent, US Airways Group, Inc., has no parent corporation and no publicly held company owns 10% or more of its stock.

2. The parent company of Respondent US Airways, Inc., is US Airways Group, Inc. The stock of US Airways Group, Inc., is publicly traded; it owns 100% of the stock of US Airways, Inc.

3. Respondent, Retirement Income Plan for Pilots of USAir, Inc., has no parent corporation and no publicly held company owns 10% or more of its stock.

PARTIES TO THIS PROCEEDING

Appendix D to the petition contains a list of all of the parties to this proceeding. Pet. App. 26a-35a.

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Respondents, US Airways Group, Inc., US Airways, Inc., and Retirement Income Plan for Pilots of USAir, Inc., respectfully submit this brief in opposition to the petition for certiorari.

OPINIONS BELOW

The judgment of the court of appeals (Pet. App. 1a-2a) is not reported but is available at 1999 U.S. App. LEXIS 3979 (D.C. Cir. Feb. 19, 1999). The decision of the district court granting respondents' motion to dismiss (Pet. App. 7a-25a) is reported at 927 F. Supp. 478 (D.D.C. 1996). The order of the district court denying petitioners' motion for reconsideration (Pet. App. 3a-6a) is not reported. The decision of the court of appeals dismissing petitioners' initial appeal in this case is reported at 132 F.3d 770 (D.C. Cir. 1998).

STATEMENT OF JURISDICTION

Petitioners invoke the jurisdiction of this Court under 28 U.S.C. § 1254(1). For the reasons given by the district court and the court of appeals, the federal courts lack subject matter jurisdiction over the merits of petitioners' claims.

STATUTE INVOLVED

In addition to the statutory provisions set out in the petition, Pet. 1-2, the following statutory provision is involved in this case:

> **45 U.S.C. § 153 First (q):** If an employee or group of employees, or any carrier, is aggrieved by the failure of any division of the Adjustment Board to make an award in a dispute referred to it, or is aggrieved by any of the terms of an award or by the failure of the division to include certain terms in such award, then such employee or group of

> employees or carrier may file in any United States district court in which a petition under paragraph (p) could be filed, a petition for review of the division's order. . . . The Court shall have jurisdiction to affirm the order of the division or to set it aside, in whole or in part, or it may remand the proceeding to the division for such further action as it may direct. On such review, the findings and order of the division shall be conclusive on the parties, except that the order of the division may be set aside, in whole or in part, or remanded to the division, for failure of the division to comply with the requirements of this chapter, for failure of the order to conform, or confine itself, to matters within the scope of the division's jurisdiction, or for fraud or corruption by a member of the division making the order.

COUNTERSTATEMENT OF THE CASE

In certain circumstances and for certain pilots employed by US Airways, Inc., the Retirement Income Plan for Pilots of USAir, Inc. (the "Plan"), provides a pension benefit based on the "Standard & Poor's 500 stock index (unadjusted for dividends)." Acting as Plan Administrator, US Airways has, for decades, interpreted the phrase to mean that the benefit is calculated excluding dividends.[1]

Petitioners, conversely, claim that "unadjusted for dividends" means that the pension benefit must be calculated

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1. Petitioners suggest that this interpretation is a more recent creation, but that claim is belied by numerous facts in the record, including a memorandum drafted by the US Airways employee responsible for making the calculations just three months after the negotiation of the relevant contractual language. The memorandum confirms that the calculation is based on "the S&P 500 stocks (*without reinvestment of dividends*)." Appendix to this brief at 1a (emphasis added), (Joint Appendix p. A1423 in the court of appeals).

assuming the reinvestment of dividends. The Complaint in this case was premised on the assertion that US Airways Inc. ("US Airways"), has misinterpreted the Plan and thus miscalculated petitioners' pension benefits.

The district court, however, held that it lacked subject matter jurisdiction to construe the labor agreement, and the court of appeals affirmed. That jurisdictional determination — and not the merits of petitioners' contractual construction — is the subject of the petition.

1. ***The petitioners*****:** Petitioners are approximately 430 retired pilots and 65 pilots currently employed by US Airways, Inc., although when the Complaint was filed, roughly one third of the petitioners were flying for the Company. Because petitioners were on the US Airways[2] pilot seniority list as of December 1, 1972, special provisions of US Airways' pilot pension plan apply to them, including the provision at issue in this case.

All US Airways pilots are represented for purposes of collective bargaining by the Air Line Pilots Association, International ("ALPA" or the "Union"). ALPA has disclaimed any interest in representing the retired pilots.

2. ***The Retirement Board*****:** As required by the Railway Labor Act ("RLA"), 45 U.S.C. § 184, the ALPA-US Airways collective bargaining agreement establishes arbitration boards or "system boards of adjustment." One specialized system board created by the agreement is called the Retirement Board. It has exclusive authority to resolve disputes which arise out of the application and interpretation of the collectively bargained terms of the Plan. The Retirement Board is comprised of two

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2. Allegheny Airlines changed its name to USAir in 1979, and in 1997 changed its name again to US Airways. For the sake of simplicity, this brief refers to the airline as US Airways unless the context requires otherwise.

representatives selected by ALPA and two representatives selected by US Airways. When these board members cannot agree on the way to resolve a particular dispute, they appoint an Impartial Referee.

Any Plan participant (including any of the retired petitioners) may submit any dispute he or she might have concerning participation in or benefits under the Plan to the Retirement Board without ALPA's involvement or approval. The decisions of the Retirement Board, with or without an Impartial Referee, are final and binding on all parties. Each US Airways pilot receives a copy of the collective bargaining agreement, and ALPA has periodically publicized the role of the Retirement Board to its members at US Airways.

3. ***The dispute*****:** In the late 1980's, a group of US Airways pilots complained to both US Airways and the Union that the Company had misconstrued the language of the contract regarding their pension rights, and accordingly had miscalculated their retirement benefits. US Airways commissioned the actuarial firm Towers Perrin to study the methods by which the Plan had been administered; Towers Perrin confirmed that the benefit was to be calculated without assuming the reinvestment of dividends.

ALPA also studied the matter, and then commissioned Deloitte & Touche to review the results reached by Towers Perrin. Deloitte & Touche agreed with Towers Perrin, *i.e.*, concluded that US Airways' administration of the Plan was consistent with the Plan language. *Id.* Appendix to this brief at 6a.[3]

4. ***The litigation*****:** After the outside actuarial firms had confirmed that US Airways had been administering the Plan in

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3. Deloitte & Touche did recommend, however, that the letter agreement being negotiated to memorialize Plan operations be more explicit in confirming that the calculation is to be made without assuming the reinvestment of dividends. *Id.*

a manner consistent with its terms, ALPA informed the complaining pilots that it would not pursue the matter on their behalf and urged them to obtain separate counsel. Pet. at 7; Appendix to this brief at 4a. Rather than filing a claim with the Retirement Board, petitioners sued US Airways, US Airways Group, Inc. (the holding company which owns US Airways), and the Plan under the Employee Retirement Income Security Act ("ERISA"). Counts I and III of the Complaint alleged that US Airways had misinterpreted and thus misapplied the negotiated benefit terms. Count II alleged that US Airways had inaccurately described the available benefits in the Plan's Summary Plan Description.

The district court concluded that the interpretation of the collectively bargained pension benefit is the function of the "mandatory, exclusive, and comprehensive [arbitration] system for resolving" contractual disputes established under the Railway Labor Act — in this instance, the Retirement Board. *See Brotherhood of Locomotive Eng'rs v. Louisville & Nashville R.R.*, 373 U.S. 33, 38 (1963). The court concluded (and petitioners did not disagree) that Counts I and III of the Complaint turned entirely on the interpretation of the contract. If petitioners are correct in their reading of the contract, the court held, the system board could award the requested relief; if they are incorrect, as a matter of law, Counts I and III of the Complaint state no viable ERISA claim. The court accordingly dismissed Counts I and III of the Complaint. The court concluded, however, that petitioners might have an independent ERISA claim under Count II — even if the Retirement Board rejected petitioners' construction of the contract — and so it stayed proceedings on that Count pending completion of the system board proceedings.

Petitioners sought reconsideration of the district court's ruling; the court denied the motion. Pet. App. 3a. Petitioners then filed their first appeal in this case, but the D.C. Circuit held that the Order was not an appealable final order, and

dismissed the appeal. *Everett v. US Airways Group, Inc.*, 132 F.3d 770 (D.C. Cir. 1998).

On remand, the district court certified its Order dismissing Counts I and III of the Complaint pursuant to Fed. R. Civ. P. 54(b). On this second appeal, the court of appeals affirmed the judgment of the district court substantially for the reasons stated in the district court's opinion. Pet. App. 2a. Petitioners now seek a writ of certiorari.

SUMMARY OF ARGUMENT

1. The only question answered by the court of appeals — and the only one posed by the petition — concerns the exclusive and mandatory jurisdiction of system boards of adjustment to determine the meaning of labor contracts in the airline industry. This Court has held repeatedly that, under the Railway Labor Act, *only* statutorily mandated arbitration boards have jurisdiction to interpret a collective bargaining agreement. This is true even when the contract provision at issue concerns an employee benefit otherwise regulated by the ERISA.

Petitioners insist that the Railway Labor Act and its compulsory dispute resolution processes apply only to current employees, not to former employees. This Court, however, has twice held expressly that the RLA's arbitration provisions apply equally to current *and* former employees so long as "the claim itself arises out of the employment relationship." *Pennsylvania R.R. v. Day*, 360 U.S. 548, 552 (1959) (emphasis added); *see also Andrews v. Louisville & Nashville R.R.*, 406 U.S. 320, 323 (1972). Any other rule, this Court has held, would result in a gerrymandered dispute resolution process, with arbitrators construing the contract for active employees and juries construing the same provisions for retired employees. Such a schizophrenic system is bound to produce inconsistent results — with one set of rules applicable to active employees, and a different set of rules applicable to a second, otherwise identically

situated group of participants. That is precisely the evil Congress and this Court sought to avoid by requiring that *all* contract disputes be channeled into the system boards.

2. Petitioners also assert that pension benefit claims are not subject to arbitration because they do not involve "rates of pay, rules, or working conditions." This Court has held, however, that a dispute is subject to the RLA's exclusive arbitration system so long as "a [non-frivolous] claim has been made that the terms of an existing agreement either establish or refute the presence of a right to take the disputed action." *Consolidated Rail Corp. v. RLEA*, 491 U.S. 299, 305 (1989). Interpreting this standard, the courts of appeals uniformly have held that pension and other benefit disputes fall within the system board's exclusive jurisdiction.

3. Petitioners claim that the court below rejected the holding of the Sixth Circuit Court of Appeals in *Kaschak v. Consolidated Rail Corp.*, 707 F.2d 902 (6th Cir. 1983), thereby creating a division of circuit authority on an important question. The court below, however, only "reject[ed] the applicability of [*Kaschak*] *to the facts here*. . . ." Pet. App. 2a (emphasis added). This hardly qualifies as a split of authority requiring this Court's intervention.

Moreover, the court below was correct in its treatment of *Kaschak*. In that case, the union had assertedly told one of its members that it would pursue a grievance on his behalf, lulling the individual into inaction until it was too late for him to pursue the grievance on his own. The Sixth Circuit held that the union's misconduct had effectively precluded individual action and therefore entitled the plaintiff to bypass the RLA's arbitration procedures. 707 F.2d at 908. Here, by contrast, ALPA explicitly told petitioners that it would *not* pursue the matter for them and urged them to secure independent counsel; petitioners failed to press their claims before the Retirement Board only because they thought they had a better chance on the merits in court.

4. In the absence of any real dispute about the legal standards applicable to contract disputes under the RLA, petitioners argue that the court of appeals misperceived the idiosyncratic facts in this case; those facts do not give rise to any issue worthy of this Court's review.

Petitioners rationalize their failure to pursue the RLA's adjustment board procedures by asserting that to have submitted to arbitration would have been "futile." They assert that US Airways and ALPA (whose members comprise the Retirement Board) are allied against them, and therefore complain that they were (and are) destined to lose in arbitration.

The court of appeals rejected this assertion based on the uncontested facts. It may well be difficult to conceive how petitioners could prevail on the merits of the claim, *either* before the Retirement Board or in the district court; US Airways and ALPA — the entities that negotiated the benefit — and two of the nation's most respected actuarial firms (Deloitte & Touche and Towers Perrin) agree that petitioners are simply wrong. The doctrine of futility, however, does not grant special rights to those with the most baseless claims, those cases in which an adverse result is most plainly fore-ordained. The rule urged by petitioners would permit those with the most frivolous claims to pick their forum, while those with worthy, or even colorable, claims would be routed to mandatory arbitration.

Petitioners also predict that an arbitration proceeding before the system board would deny them due process, and suggest that if an arbitration occurs, ALPA would likely violate the duty of fair representation it owes, at a minimum, to its current pilots. Petitioners have not been deprived of due process, however, and the Complaint alleged no breach of the duty of fair representation, indeed, alleged no wrongdoing at all by ALPA. Petitioners only make dire predictions about what likely would result were their claims submitted to the system board.

Even assuming that due process protections apply to arbitration proceedings under the RLA (and this Court has held otherwise), the inchoate nature of petitioners' fair representation and due process arguments makes them particularly ill-suited to review on *certiorari*. Petitioners seek to avoid the mandatory and exclusive dispute resolution mechanism designed by Congress simply because they find it inconvenient.

There simply is no need to except petitioners from the jurisdiction of the RLA's arbitration boards. Petitioners will suffer no prejudice if they are required to submit to the RLA's dispute resolution processes. If petitioners go to arbitration, and are dissatisfied with the results, the RLA explicitly permits them to return to court in an action to impeach the award, and they can assert the arguments they advance in the petition, but with the benefit of a full record.

The exception urged by petitioners would inject unnecessary confusion and uncertainty into a settled and predictable area of the law. Currently, both employees and employers know that all of their contract construction disputes will go to a system board, and will be considered promptly by individuals with intimate knowledge of the industry, the parties, and the history of collective bargaining between them. The rule urged by petitioners would result in parallel proceedings in arbitration and in federal court, with the accompanying potential for inconsistent results and labor unrest. The petition is premature and inconsistent with the RLA. It should be denied.

REASONS FOR DENYING THE WRIT

I.

UNDER THIS COURT'S PRECEDENTS, ONLY SYSTEM BOARDS OF ADJUSTMENT HAVE JURISDICTION TO CONSTRUE RLA COLLECTIVE BARGAINING AGREEMENTS.

The central question posed by the merits of petitioners' claims is the meaning of the phrase "unadjusted for dividends" — a question of contract interpretation. The courts below, however, properly recognized that under the Railway Labor Act, the business of contract interpretation is a monopoly owned by system boards of adjustment — here the Retirement Board, established pursuant to the RLA and implemented by the ALPA-US Airways collective bargaining agreement. The statutory arbitration procedure for resolving contract interpretation, or "minor," disputes is "a mandatory, exclusive, and comprehensive system." *Brotherhood of Locomotive Eng'rs v. Louisville & Nashville R.R.*, 373 U.S. 33, 38 (1963). "[T]he compulsory character of [the system board procedures] stems not from any contractual undertaking between the parties but from the [RLA] itself." *Andrews v. Louisville & Nashville R.R.*, 406 U.S. 320, 323 (1972). "Congress considered it essential to keep these so-called 'minor' disputes within the Adjustment Board and out of the courts." *Union Pac. R.R. v. Sheehan*, 439 U.S. 89, 94 (1978) (citations omitted).

The court of appeals' jurisdictional determination is supported by an unbroken line of decisions from this Court and a uniform body of circuit law. Petitioners are left to nibble at the margins of forty years of established precedent. There is no issue worthy of *certiorari* present in this case.

A. This Court Has Held Explicitly That The System Board Process Is Mandatory For Retired Employees

Petitioners claim that the system board procedures do not apply to them because some of them are retired, and therefore, at least the retired petitioners are not "employees" under the purported "plain language" of the RLA. The claim is frivolous, foreclosed by the language of the statute, this Court's decision in *Pennsylvania R.R. v. Day*, 360 U.S. 548 (1959), and every subsequent lower court decision to decide the point. Specifically, the Court in *Day* said that:

> The [RLA arbitration process] was established as a tribunal to settle *disputes arising out of the relationship between carrier and employee*. All the considerations which led Congress to entrust an expert administrative board with the interpretation of collective bargaining agreements are *equally applicable when, as here, the employee has retired from service . . . . The same collective bargaining agreement must be construed with the same need for uniformity of interpretation and orderly adjustment of differences*. There is nothing in the [RLA] which requires that the employment relationship subsist throughout the entire process of administrative settlement. The purpose of the [RLA] is fulfilled if the *claim itself arises out of the employment relationship* which Congress regulated.

Id. at 551-52 (emphasis added).

Petitioners' contrary rule would turn retirees into a "class of preferred claimants":

> [Under a contrary rule,] [r]etired employees would be allowed to bypass the Board specially constituted for hearing . . . disputes whenever they deemed it

> advantageous to do so, whereas all other employees would be required to present their claims to the Board. . . . To allow [the retired respondent] now to try his claim in the District Court would only accentuate the danger of inequality of treatment and its consequent discontent which it was the aim of the [RLA] to eliminate. . . . *Since nothing is a greater spur to conflicts . . . than . . . unfair differentials, not to respect the centralized determination of these questions through the [RLA] Adjustment [procedure] would hamper if not defeat the central purpose of the [RLA].*

Day, 360 U.S. at 553 (emphasis added).

Day is no aberration; every court to consider the question has concluded that RLA adjustment procedures must be followed even by individuals who are no longer active employees, as long as the underlying claim arose out of the employment relationship.[4]

Petitioners seek precisely the result *Day* was intended to prevent. Well over one hundred of the petitioners still worked

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4. *See, e.g., Long v. Flying Tiger Line, Inc. Fixed Pension Plan for Pilots*, 994 F.2d 692, 695 (9th Cir. 1993) (court lacked subject matter jurisdiction over former employee's ERISA claim); *Bowe v. Northwest Airlines, Inc.*, 974 F.2d 101, 103 (8th Cir. 1992) (same), *cert. denied*, 507 U.S. 992 (1993); *Beard v. Carrollton R.R.*, 893 F.2d 117 (6th Cir. 1989) (former employee who alleged that railroad lied to insurance company following his termination about his entitlement to post-termination benefits is obligated to follow RLA procedure); *Leu v. Norfolk & Western Ry.*, 820 F.2d 825, 832 n.10 (7th Cir. 1987) (former employee's claim that railroad improperly offset medical charges from settlement is subject to RLA procedures); *Air Line Pilots Ass'n Int'l v. Alaska Airlines, Inc.*, 735 F.2d 328, 329 (9th Cir. 1984) (retired employee's grievance regarding calculation of retirement benefits, filed several months after retirement, is subject to RLA adjustment procedures).

as pilots for US Airways when this lawsuit was filed. Even under petitioners' reading of *Day*, those petitioners still employed by US Airways would be obligated to use the RLA's contract dispute procedures, but the remaining petitioners would be free to pursue a federal court action.[5] Neither case law nor logic supports such a bizarre result.

Petitioners' "plain language" argument is also faulty as a matter of statutory construction. Petitioners say that as retired employees of US Airways, they are not "employees" under the RLA because they are no longer "in the service of [a] carrier." 45 U.S.C. § 151 Fifth. The statutory term "employee," however, "*includes* every person in the service of a carrier,"[6] but it does not *exclude*, either expressly or by implication, individuals who were, but no longer are, "in the service of a carrier."[7] *Id.* (emphasis added). Petitioners seek to read into the statute language of limitation that simply does not exist.

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5. At oral argument in the court of appeals, petitioners' counsel suggested that so long as *one* of the group of claimants had retired, they would *all* be excused from pursuing the RLA's dispute resolution process.

6. Petitioners excised the word "includes" from their excerpted definition of the term "employee." Pet. at 12.

7. For this reason, petitioners cannot rely on *Nelson v. Piedmont Aviation, Inc.*, 750 F.2d 1234, 1236-37 (4th Cir. 1984), *cert. denied*, 471 U.S. 1116 (1985), which held that *applicants* for employment are not yet RLA employees. Unlike former employees, the claims of applicants will not involve "either incidents that occurred or benefits that accrued while they had been employed and subject to the protections of the RLA." *Air Line Pilots Ass'n, Int'l v. United Air Lines*, 802 F.2d 886, 912 (7th Cir. 1986) (holding that pilots who never performed any work for United nor submitted to United's supervision of them in their work were not "employees" under the RLA; distinguishing pilots' status under the RLA from the status of former employees who are "employees" under the RLA, according to *Day*), *cert. denied*, 480 U.S. 946 (1987).

Petitioners' constricted reading of the term "employee" is patently inconsistent with this Court's decisions in both *Day* and *Andrews*. Both cases involved claims by individuals who formerly worked for the carrier (*i.e.*, those no longer "in the service of a carrier"), both raised disputes about the meaning of the collective agreement, and this Court determined that both claims were within the exclusive jurisdiction of the RLA's arbitration boards.

Indeed, if petitioners' reading of the statute were correct, system boards of adjustment would be powerless to hear wrongful discharge claims, since, by definition, the grievant in these cases will always be a *former* employee — no longer "in the service of [the] carrier" — by the time the matter was grieved. This unjustifiably narrow reading of the term would bleed the statute of its most important employee protections. *Accord Professional Cabin Crew Ass'n v. National Mediation Bd.*, 872 F.2d 456, 460 (D.C. Cir.) (rejecting union's "plain language" argument that former strikers are not "employees" under the RLA; the word "includes" in the RLA definition of "employee" is not intended to be a word of limitation; holding that the union's "extreme position has been rebuffed by the [National Mediation] Board and courts alike"), *cert. denied*, 493 U.S. 974 (1989); *cf. Robinson v. Shell Oil Co.*, 519 U.S. 337, 341-42 (1997) (term "employee" as used in Title VII includes former employees, *inter alia* because the term as used in the statute includes no "temporal qualifier"; "Congress . . . could have used the phrase 'current employees' ").

B. The System Board's Jurisdiction Is Not Optional

Petitioners make two further efforts to distinguish *Day*; neither is meaningful:

1. Petitioners argue that *Day* does not apply because the employee there filed a grievance under the RLA prior to quitting; petitioners note that they "did not commence the RLA process while they were employees."

Day, however, expressly rejected this proffered distinction. The determining factor is not the claimant's employment status at any particular point in the dispute resolution process; rather "[t]he purpose of the [RLA] is fulfilled [and its mandatory arbitration system applies] if the *claim itself arises out of the employment relationship* which Congress regulated." *Day*, 360 U.S. at 552 (emphasis added). Petitioners' entitlement to pension benefits arises, if at all, out of their employment relationships with US Airways.[8]

2. Similarly, petitioners contend that their pension benefit claim is not subject to arbitration because it is not a "minor" dispute — *i.e.*, it does not "grow[ ] out of grievances or out of the interpretation or application of agreements concerning rates of pay, rules, or working conditions." 45 U.S.C. § 153(i). As this Court has held, a dispute is minor as long as "a [non-frivolous] claim has been made that the terms of an existing agreement either establish or refute the presence of a right to take the disputed action." *Consolidated Rail Corp. v. RLEA*, 491 U.S. 299, 305 (1989).

Petitioners' claim is wholly contingent on the meaning of the negotiated plan language. Thus, Petitioners' claim

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8. Petitioners also rely on *Allied Chem. & Alkali Workers v. Pittsburgh Plate Glass Co.*, 404 U.S. 157 (1971) ("*PPG*"), for the proposition that because the term "employee" as used in the National Labor Relations Act ("NLRA"), 29 U.S.C. § 151, *et seq.*, does not include retirees, the same is true under the RLA. Petitioners' reading of *PPG* is selective at best (since the *PPG* opinion suggested that the remedy available to the retired employees was to arbitrate their claim to benefits, *id.* at 181 n.20), but more importantly, the case interprets the wrong statute — one where arbitration is an option rather than a statutory mandate — and answers an entirely different question about the scope of the bargaining duty. It did not overrule, limit, or even mention *Day*. It is irrelevant.

unarguably is a minor dispute — subject to the exclusive jurisdiction of the system board.[9]

C. The Jurisdiction Of The System Board Is Not Dependent On The Superiority Of Arbitral Competence In A Given Case

Petitioners also argue that the RLA's mandatory arbitration system does not apply whenever labor arbitrators generally lack specialized knowledge regarding the contractual issue presented.

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9. The courts of appeals have uniformly held that disputes over pensions and other post-retirement benefits are minor disputes, and that pension benefits are comprehended within the phrase "rates of pay, rules, or working conditions." *See Long*, *supra*, 994 F.2d at 695 ("In determining the extent of the pilots' benefits under the collectively bargained pension agreement, it was within the Retirement Board's jurisdiction to consider the weight that should be accorded to the summary plan description"); *Bowe*, *supra*, 974 F.2d at 103 (affirming dismissal for lack of subject matter jurisdiction because former employee's "claim for disability benefits requires the interpretation or application of the collective bargaining agreement"); *Beard*, *supra*, 893 F.2d at 123 (holding that Adjustment Board had exclusive jurisdiction over benefit claim, even though claim filed after plaintiff left railroad's employ); *Air Line Pilots Ass'n, Int'l v. Northwest Airlines*, 627 F.2d 272, 275 (D.C. Cir. 1980) ("[A]ir carriers and their employees are obliged to bargain collectively over 'rates of pay, rules, or working conditions' terms which include employee pensions") (citation omitted); *De la Rosa Sanchez v. Eastern Airlines*, 574 F.2d 29, 32-33 (5th Cir. 1978) ("The determination of whether plaintiff was entitled to any pension payments from [the airlines] was exclusively for the Pilots System Board of Adjustment"); *Jackson v. Trans World Airlines*, 457 F.2d 202, 204 (2d Cir. 1972) ("Retirement and pension plans are recognized as mandatory subjects of the collective bargaining process") (citations omitted); *Elgin Joliet & E. Ry. v. Brotherhood of R.R. Trainmen*, 302 F.2d 540, 543-44 (7th Cir.) (holding that pension plans are encompassed by the phrase "rates of pay, rules, and working conditions," and therefore are a mandatory subject of collective bargaining), *cert. denied*, 371 U.S. 823 (1962); *McMullans v. Kansas, Oklahoma & Gulf Ry.*, 229 F.2d 50, 54-55 (10th Cir. 1956) (same), *cert. denied*, 351 U.S. 918 (1956).

Under petitioners' thesis, a district judge is entitled to conclude in any given case that he or she is more competent on the particular subject matter of the contract than are arbitrators as a class, and on that basis deny the system board's jurisdiction. But Congress and this Court have plainly drawn an unbreachable line marking out the boundaries of the system board's jurisdiction. If the dispute "relates . . . to the meaning or proper application of a particular provision" of a collective bargaining agreement, it must be handled by the RLA's arbitration boards and not the courts. *Consolidated Rail*, 491 U.S. at 303. There simply is no room for the case-by-case competence inquiry petitioners propose.

II.

PETITIONERS HAVE FAILED TO IDENTIFY ANY DIVISION OF AUTHORITY AMONG THE CIRCUIT COURTS RELEVANT TO THEIR FAILURE TO USE THE SYSTEM BOARD PROCESS.

There is no genuine inter-circuit conflict on any issue posed by the petition. Petitioners argue that the court below rejected the Sixth Circuit's holding in *Kaschak v. Consolidated Rail Corp.*, 707 F.2d 902 (6th Cir. 1983). In fact, the D.C. Circuit acknowledged *Kaschak*, but correctly concluded that the *Kaschak* holding did not apply.

The plaintiff in *Kaschak* sued his employer, Conrail, for wrongful discharge. Conrail moved to dismiss the claim because Kaschak had failed to grieve his discharge through the system board process. The district court granted the motion, but the Sixth Circuit reversed, holding that the union, through no fault of Kaschak, had failed to initiate Kaschak's grievance in a timely manner. The court observed:

> While there is no doubt that *an employee may not opt to have his minor dispute resolved before a court rather than before the Board*, that is *not* the situation

> which Kaschak's claim presents to this Court. Kaschak contends that he never had the chance to choose between the Board and the district court. Rather, *he claims that he requested the Union to present his grievance to the Board and that the time for individual resort to the Board passed while he was relying on the Union to represent him.*

Id. at 908 (emphasis added in part; footnote omitted). In order for Kaschak to sue Conrail in federal court, the Sixth Circuit concluded, he would have to meet the "extreme" burden of establishing: (1) that his failure to request arbitration before the Board individually was caused by the Union's breach of the duty of fair representation (*i.e.*, its failure to process his grievance); and (2) that it was reasonable for him to rely on the union to process the grievance. *Id.* at 913.

As the court below concluded, *Kaschak* does not apply to this case. Petitioners failed to initiate a claim before the Retirement Board — *not* because ALPA falsely promised that it would pursue the grievance on their behalf — but because petitioners believed they could get a more sympathetic hearing in court. Indeed, ALPA explicitly told petitioners that the Union would *not* pursue their claim and urged them to get their own lawyer. Pet. at 7. Petitioners were not "lulled" into inaction by union misfeasance; they were tempted into federal court by the prospect of a decisionmaker less familiar with the contract, its history, and the parties' negotiating relationship.

That is why the D.C. Circuit explicitly held: "We reject the applicability of [*Kaschak*] *to the facts here*. . . ." Pet. App. at 2a (emphasis added).[10] This hardly qualifies as a split of circuit authority requiring this Court's intervention.

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10. Curiously, Petitioners also cite the Third Circuit's decision in *Miklavic v. USAIR, Inc.*, 21 F.3d 551 (3d Cir. 1994), to excuse their failure to initiate arbitration. In that case, however, the Third Circuit held that the rule announced in *Kaschak* did *not* excuse the plaintiffs' (Cont'd)

III.

RESORT TO THE SYSTEM BOARD PROCESS WOULD NOT HAVE BEEN "FUTILE," AND PETITIONERS HAVE NOT SUFFERED ANY BREACH OF THE DUTY OF FAIR REPRESENTATION OR DEPRIVATION OF DUE PROCESS.

Petitioners assert that resort to the Retirement Board would be "futile" — that they would be the victim of a breach of the duty of fair representation by ALPA — because US Airways and ALPA purportedly "are openly and unequivocally adverse to [their] position." Pet. at 21. Petitioners predict that if they actually pursued their claim before the system board, they would lose. This argument suffers from several flaws; each is independently fatal to the petition:

1. The doctrine of futility does not grant special rights to those with the most baseless claims, *i.e.*, those cases in which an adverse result is most plainly fore-ordained. Such a regime would be patently inconsistent with the RLA. *See Andrews*, *supra*, 406 U.S. at 322 ("[T]he notion that the grievance and arbitration procedures provided for minor disputes in the Railway Labor Act are optional, to be availed of as the employee or the carrier chooses, was never good history and is no longer good law"). As the Third Circuit has explained, "[a]n employee whose substantive claims are clearly foreclosed by the language of the collective bargaining agreement might argue that submission of his claim to the Adjustment Board would be futile; yet clearly, this is not the sort of futility that would, in itself, warrant access to a judicial forum." *Capraro v. United Parcel*

(Cont'd)

failure to initiate arbitration, because this failure was "simply no fault of the union." *Id.* at 558. The petitioners remained "free to file a timely grievance, even without the [union]." *Id.* Accordingly, their complaint, which asserted only a minor dispute, was dismissed for lack of subject matter jurisdiction. *Id.*

Serv. Co., 993 F.2d 328, 335 n.11 (3d Cir. 1993); *see also Kaschak*, *supra*, 707 F.2d at 908 ("[T]here is no doubt that an employee may not opt to have his minor dispute resolved before a court rather than before the Board"). The rule urged by petitioners would give those with the most frivolous claims a choice of fora, while those with worthy, or even colorable, claims would be routed to mandatory arbitration.

2. Petitioners claim that they are bound to lose in arbitration, not because of the merits of their claim, but because ALPA has a hidden, self-interested agenda in rejecting petitioners' construction of the contract. They predict that this self-interest would manifest itself during the hearing when ALPA would join US Airways in rejecting petitioners' claims on the merits.

Petitioners, however, cannot bypass the "mandatory, exclusive, and comprehensive system"[11] for resolving contractual disputes simply because they suspect that the union might act out of self-interest. As this Court explained in *Vaca v. Sipes*, 386 U.S. 171, 184 (1967) (emphasis added; citation omitted), "it is settled that the employee must at least *attempt* to exhaust exclusive grievance and arbitration procedures established by the bargaining agreement." More specifically, "a potential conflict between ALPA and [petitioners] does not alone render the proceedings before the Adjustment Board futile." *Calvert v. Trans World Airlines*, 959 F.2d 698, 701 (8th Cir. 1992) (rejecting argument that "any attempt to seek relief before the Adjustment Board would be futile" because of alleged hostility of the union); *Morales v. Southern Pac. Transp. Co.*, 894 F.2d 743, 745 (5th Cir. 1990) (claim that union officials were hostile towards employees was insufficient to show futility).

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11. *Brotherhood of Locomotive Eng'rs v. Louisville & Nashville R.R.*, 373 U.S. 33, 38 (1963).

The Railway Labor Act provides petitioners an orderly process to test their theories of hostility: *if* petitioners had litigated their claim before the system board, and had lost, and *if* ALPA's conduct had suggested fraud or corruption, the resulting award would have been subject to impeachment in federal court under 45 U.S.C. § 153 First (q). In this scenario, petitioners could have asserted the arguments they advance in the petition, but with the benefit of a full record.

But petitioners argue that Congress' design is just a waste of their time. Their petition poses what amounts to a claim of "anticipatory corruption," but no facts support it and no law — from this Court or any other court — would authorize the procedural bypass they seek.

For all of the foregoing reasons, petitioners' claims of futility are *predictions*, not facts, and the arguments advanced in the petition are premature. To be sure, petitioners' claim is an unlikely one at best in *any* forum. But petitioners cannot know what position ALPA might take in arbitration or whether ALPA will vote to appoint a Referee. The RLA provides an orderly process for adjusting contract interpretation disputes; petitioners cannot shed themselves of this statutory mandate simply because they find it inconvenient.

Similarly, petitioners' due process claim is premature. They have not suffered any depravation of due process[12]; they merely suggest that they would likely have suffered some deprivation

12. The due process clause does not even apply to system board proceedings under the Railway Labor Act (although the Court need not reach this question given the inchoate nature of petitioners' claim). In *Sheehan*, the plaintiff argued that he had been denied a "fair hearing" on the merits of his claim, but this Court emphasized that "[j]udicial review of Adjustment Board orders is limited to [the] three specific grounds [set forth in the statute itself]. [Arbitration orders under the RLA] may be set aside only for the three reasons specified therein. *We have time and again emphasized that this language means just what it says.*" *Id.* 439 U.S. 89, 93 (emphasis added).

had they actually proceeded to arbitration.[13] Significantly, all but one of the RLA decisions cited by petitioners in support of their due process claim, Pet. Br. at 23-27, involved *post-hearing* challenges made on a full record.[14] The other decision — *Haney v. Chesapeake & Ohio R.R.*, 498 F.2d 987 (D.C. Cir. 1994) — explicitly *rejected* the type of pre-hearing challenge petitioners are attempting here, instructing the plaintiff to proceed to

13. *Cf. Hodel v. Indiana*, 452 U.S. 314, 335-36 (1981) (holding that due process challenge to statute's civil penalty procedures was "premature" because plaintiffs did not show they were ever assessed civil penalties, much less that they were injured); *Thorpe v. Housing Auth. of the City of Durham*, 393 U.S. 268, 284 (1969) (holding that a decision on petitioner's due process claims regarding hearing procedures would be "premature," because intervening events, such as an administrative finding for the petitioner, may obviate the need for a challenge to the procedures); *Thomas v. City of New York*, 143 F.3d 31, 34-35 (2d Cir. 1998) (holding that due process challenge to license issuance process was "premature" before a hearing or the issuance of written findings); *Frey v. Commodity Exchange Auth.*, 547 F.2d 46, 49 (7th Cir. 1976) (dismissing pre-hearing due process challenge because it was uncertain how the administrative law judge would rule).

14. *See Union Pac. R.R. v. Sheehan*, 439 U.S. 89, 89-90 (1978) (Board decision rendered after hearing); *Union Pac. R.R. v. Price*, 360 U.S. 601, 602 (1959) (same); *Pennsylvania R.R. v. Rychlik*, 352 U.S. 480, 482-83 (1957) (same); *English v. Burlington N. R.R.*, 18 F.3d 741, 743 (9th Cir. 1994) (same); *Edelman v. Western Airlines*, 892 F.2d 839, 841 (9th Cir. 1989) (same); *Hayes v. Western Weighing and Inspection Bureau*, 838 F.2d 1434, 1436 (5th Cir. 1988); *Steffans v. Brotherhood of Ry. Airline and Steamship Clerks*, 797 F.2d 442, 443-44 (7th Cir. 1986) (same), *amended*, 123 L.R.R.M. 2835 (7th Cir. 1986); *Elmore v. Chicago & Illinois Midland Ry.*, 782 F.2d 94, 94-95 (7th Cir. 1986) (same); *Henry v. Delta Airlines*, 759 F.2d 870, 871 (11th Cir. 1985) (same); *Hall v. Eastern Airlines*, 511 F.2d 663, 663 (5th Cir. 1963) (same); *Hornsby v. Dobard*, 291 F.2d 483, 484 (5th Cir. 1961) (same); *Edwards v. Capital Airlines*, 176 F.2d 755, 756 (D.C. Cir. 1949) (same), *cert. denied*, 338 U.S. 885 (1949); *D'Elia v. New York, New Haven & Hartford R.R.*, 230 F. Supp. 912, 913 (D. Conn.) (same), *aff'd*, 338 F.2d 701 (2d Cir. 1964); *Farris v. Alaska Airlines*, 113 F. Supp. 907, 908 (W.D. Wash. 1953) (same).

arbitration and use the Act's processes to challenge any subsequent union malfeasance.

The orderly processes of the Railway Labor Act serve important goals; the court of appeals correctly concluded that petitioners were obligated to process their claims through the Act's procedures. No decision of this court or any court of appeals would suggest a different result.

CONCLUSION

For the foregoing reasons, the Court petition for writ of certiorari should be denied.

Respectfully submitted,

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